

Chapter 2

Risks, Crisis and the European Union Law: Implications and Parallels for Addressing Financial, Energy Security and Environmental Catastrophe

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Abstract This paper compares crisis narratives and descriptions of the Anthropocene to the institutional and substantive changes that have been brought on the way by the creation of the Banking and Energy Union in the EU. From the aims alone, it becomes clear that both the Banking and the Energy Union were born out of the political desire to make each of the systems more robust, but that the visions themselves fall short of significant substantive change or a reinvention of the system. Whilst the explanation of this is almost entirely political, some of the reasons also have to do with the functioning and the mechanisms of the law. The law, in particular public law, stands and falls with formal legal principles, has a particular difficulty dealing with, defining and coming up with solutions for risk whilst staying true to formal principles such as certainty and proportionality. Risk detection requires the introduction of new procedures and agencies (institutions). The mitigation of risks requires a multicontextual and multipolar balancing of rights and interests. Both proceduralism and a complex act of balancing can guarantee the integrity of law and its methodology, but they do not bring about substantive change. This paper sees a third method of risk mitigation in the creation of new institutions (such as the Energy Union, but also the United Nation or NATO). This is perceived as the creation of something that is larger than the threat it addresses ('super structures'), but substantively ends up enforcing little more than the "lowest common denominator". This paper, therefore, suggests abandoning such methodological approaches and changing the principles on which the EU and the law of the common market is based instead. It proposes a "first best" and a "second best" solution. The first is the introduction of new and prevalent aims and principles and

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an actual change of the economic system. The second (though more likely solution) proposes a mere extension of the goals of the European union, which results in a careful act of balance between more sustainability and the development of the liberal common market project.

Introduction: Notions of Catastrophe and Crisis Narratives

Justice herself, famed for fair Dealing,
By Blindness had not lost her Feeling;
Her Left Hand, which the Scales should hold,
Had often drops', bribed with Gold.

Mandeville

In the past couple of years, crisis narratives of both climate change and financial instability have become embedded in our unconscious as types of “known unknowns”. Regarding climate change, we are forced to assume that rising levels of CO₂ emissions will ultimately intoxicate and impoverish European citizens and will wipe up thousands of persons in regions of the world that are more susceptible to drought or rising seas. Financial capitalism, on the other hand, has reached a point of instability where with each new crisis massive amounts of wealth are eradicated and that doctrines such as ‘too big to fail’ mean that profits are almost entirely privatized by the few, whilst risks are almost entirely socialized (“Inequality” (Piketty 2013) or “snowball inequality” (Markovits 2015)). The effects of climate change and post-capitalism have been described as follows by various authors:

We know that if we continue on our path of allowing emissions to rise year after year, climate change will change everything about our world. Major cities will very likely drown, ancient cultures will be swallowed by the seas, and there is a very high chance that our children will spend a great deal of their lives fleeing and recovering from vicious storms and extreme droughts (Klein 2014, p. 4).

As with the end of feudalism 500 years ago, capitalism’s replacement by post-capitalism will be accelerated by external shocks and shaped by the emergence of a new kind of human being. And it has started (Manson 2015).

Living with this kind of cognitive dissonance is simple part of being alien in this jarring moment in history, when a crisis we have been studiously ignoring is hitting us in the face – and yet we are doubling down on the stuff that is causing the crisis in the first place (Klein 2014, p. 72).

The process of financialization that led to the crisis we are living in now is distinct from all other phases of financialization historically recorded in the twentieth century. Classical financial crises were situated at a precise moment of the economic cycle, particularly at the end of the cycle, in conjunction with a fall of profit margins as a result of capitalist competition on an international scale, in addition to social forces undermining geopolitical equilibrium in the international division of labor. Typical twentieth-century financialization thus represented an

attempt, somewhat “parasitic” and “desperate,” to recover what capital could no longer get in the real economy in financial markets (Marazzi 2010, p. 26).

Though there is still hope, descriptions of the Anthropocene—which has either already begun or lies in the near future—are not far removed from the above descriptions. The notion of the Anthropocene suggests that “humankind has become a global geological force in its own right” (Steffen et al. 2011a, p. 843). Life and the law in the Anthropocene seems to run under the assumption that from this point forward:

no government, whether in an over-consuming or under-consuming region, rich or poor, has enough money or personnel to restore communities disrupted by climate change events to their condition before the tragedy. It will not be possible to rebuild everywhere to restore what was.

From the perspective of legal scholarship the Anthropocene assumes irreversibility and that every dimension of life is different from times past. Under the premises of the Anthropocene, legal theorists, therefore, adopt an approach to law and policy that is fundamentally new and transformative:

When law has integrity, it is because it reflects profound social norms, shared in a society; law can also be instrumental, a tool of authority. As humans learn to cope with the disruptions occasioned by a changing climate, the need to strengthen communities around fundamental norms will be a determinant to human well-being (Robinson 2014).

The description of the Anthropocene and crisis narratives have undeniable commonalities and both suggest that it is necessary to fundamentally change the system and the norms on which it is based and to abandon the idea that the system can be “fixed” and that crisis is either temporary or manageable.

We would like to use these notions and suggestions as ‘guiding stars’ in order to analyse and critique the actual legal and political changes that have been made and the new institutions that have been put in place in order pose the fundamental question, whether we have done enough or whether the change are in fact more form than they are content.

In the aftermath of a banking crisis and the evermore daunting likelihood of an energy and environmental crisis, the EU has created two institutions: the Banking Union and the Energy Union as means and vehicle as solutions to the financial energy security and climate change crisis (tri-crisis) and to make European market more sustainable in future.

The Banking Union consists of three pillars: the single rulebook for regulatory oversight of banks; the single supervisory mechanism, for supervising Europe’s largest banks, and the single resolution system for resolving failing banks in future. The Banking Union aims to:

- ensure banks are robust and able to withstand crisis
- prevent situations where taxpayers’ money is used to save failing banks
- reduce market fragmentation by harmonising the financial sector rules
- strengthen financial stability in the euro area and the EU as a whole.

Though EU energy law is more developed and integrated than banking law and there are several references to actual legal notions which may be more adequately operationalized, in order to reach the aims set forth. The Energy Union, therefore, consists of the following five mutually reinforcing and closely interrelated dimensions which are designed to bring greater energy security, sustainability and competitiveness (Energy Union 2015, 4):

- Energy security, solidarity and trust;
- A fully integrated European energy market;
- Energy efficiency contributing to moderation of demand;
- Decarbonising the economy, and
- Research, Innovation and Competitiveness.

From the aims alone, it becomes clear that both the Banking and the Energy Union were born out of the political desire and capital to end crisis and make each of the systems more sustainable and robust but that the visions themselves fall short of a reinvention or overhaul of the system. This is either due to an unwillingness or an impossibility fix or reinvent the system whilst still clinging to old beliefs and paradigms.

Whilst the reasons for this are almost entirely political, some of the reasons also have to do with the functioning and the mechanisms of the law. As Robinson (2014) puts it: „The discipline of the law is deeply implicated in the systems that have caused the end to the Holocene, and at once is central also to the reforms needed to cope with the emerging Anthropocene.“As we shall see in the next section, the way the law classically deals with risks and catastrophe does not necessarily help to overcome our “cognitive dissonance” (Klein 2014).

Risks and the Response of the Law

The necessity to calculate future risks, to seek insurance or find other means of dealing with the uncertainties of our daily lives have almost become all-encompassing. This has been adequately described by Ulrich Beck as life in a “global risk society” in which “the category of risk consumes and transforms everything”. The constant fear or unconscious knowledge of large threats and future personal or global catastrophe has made our daily lives and states of mind one of an almost tangible psychosis. To Ulrich Beck “risk is not the same as catastrophe, but the anticipation of the future catastrophe in the presence. As a result, risk leads a dubious, insidious, would-be, fictitious, allusive existence: it is existent and non-existent, present and absent, doubtful and real” (Beck 2009, p. 1).

Currently, we experience what could be termed as a risk-taking paradox. A society, evermore prone to risk is founded on paradigms deemed impossible to change. Risk taking in the short-term seems to be uncoupled with the need for a long-term commitment to change the marked-based system. Aware of the difficulties

to change our current path the remedies proposed do not question the very structure that led to the legitimisation and everyday risk taking in the first place. This short sighted, risk-taking society is being led by institutions both blind to but also responsible for their possible elimination or reduction.

The law, in particular public law that stands and falls with formal legal principles, has a particular difficulty dealing with, defining and coming up with solutions for risk, whilst staying true to formal principles such as certainty and proportionality. It is inherently impractical and at times seemingly impossible to formulate normative rules or conclude a proportionate act of balancing different rights and interests in face of uncertainty: “while law itself is a complex, multi-layered phenomenon, it famously trades in binaries, taxonomies and other conceptual reductionisms. This—it is increasingly clear—is a deep-seated orientation ill-suited to the complexity of rapidly mutating, polycontextural, densely interwoven contemporary predicaments” (Gear 2015).

Notions and different degrees of “threat” and “danger“, ranging from an imminent threat to an apparent danger, are most common to public administrative, police and international law. Compared with notions of threat and danger, notions of risk and the necessity to regulate risks and hazards, pose a challenge to the law, as they are even less tangible and shrouded in uncertainty. Theories, definition and suggestions on the regulations of risks first surfaced when environmental challenges and nuclear, pharmaceutical and hazards relating to the materials of certain goods become evermore prominent. The law had to address these risks needed in a manner that was still proportionate with regards to the holders of property rights and rights of occupation. The law therefore developed methods to first detect these risks and hazards and then to mitigate them in a proportionate manner. Risk detection and the creation of an awareness of future risk requires the introduction of new procedures and agencies (institutions). The mitigation of risks requires a multicontextual and multipolar balancing of rights and interests (DiFabio 1994; Lepsius 1995; Ladeur 2004).

Both proceduralism and a complex multipolar balancing of interest can guarantee the integrity of law and its methodology, but they do not bring about substantive change or lead to the avoidance of catastrophe in the most effective manner. By example, it seems plausible to ban the production of nuclear energy or to break up big banks, but both can only be achieved by a transformation of the economic system rather than by an act of balancing currently existing rights and interest. On the other hand, as risks become evermore present and all-encompassing Cass Sunstein (2013) rightly points to the excessive movement towards partnerization and limitations governments can easily and readily impose on the rights and freedoms of their citizens in time of crisis or catastrophe. Citizens no longer understand the basis and the assumptions on which government action is based and the nature of the events they aim to avoid.

A third way to curb risks, which we identify and is most striking on an international and EU level, is by the creation of super institutions, such as the NATO, the UN, the Basel Committee, the World Economic Forum, the IMF, the World Bank and most recently the Banking and Energy Union. We assume that the success of these institutions is a product of the belief that they are simply larger than

the problems they address. The size of the institutions and the competences conferred onto them do not however, automatically lead to equally large substantial change. Not only the choice of wrong instruments (most recently the IMF's stern position on austerity), but almost always an insufficient degree of action are born out of the necessity to make political compromise. The current state of the Banking and Energy Union is constituent with these fears.

The Aims and Content of the Banking and Energy Union

Aims and Content of the Banking Union

The Banking Union to date consists of three pillars: the so-called "single rule book" to harmonize the regulatory requirements posed to all banks in all member states; the single supervisory mechanisms, which means that Europe's largest banks (so-called Significant Financial Institutions or "SIFIs") are now regulated by the ECB and the single resolutions mechanism: the attempt to create a resolution scheme and a functioning bankruptcy law for banks.

The single rule book consist of: (a) the Requirements Directive IV (CRD IV; Directive 2013/36/EU of 26 June 2013; Regulation (EU) No 575/2013 of 26 June 2013) which implements the Basel III capital requirements for banks; (b) the Deposit Guarantee Scheme Directive (DGSD; Directive 2014/49/EU of 16 April 2014) which regulates deposit insurance in case of a bank's inability to pay its debts; and (c) Bank Recovery and Resolution Directive (BRRD; Directive 2014/59/EU of 15 May 2014), which establishes a framework for the recovery and resolution of credit institutions and investment firms found to be in danger of failing. The single resolutions mechanism is the creation of uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms. The single supervisory mechanisms (SSM) is a new institutions that is part of the European Central Bank and has been monitoring the stability of Europe's largest banks since November 2014, after the release and review of hundreds of stress-tests.

As was the general critique of 'super intuitions' above, the creation of a large institution does not necessarily raise the bar in terms of material requirements significantly. Since the financial crisis of 2008, we know that banks hold too little capital/are too indebted and take too many risks. Since low capital creates incentives for risk taking, the solution to reducing the fragility of financial sector is obvious and simple. The implementation of the Basel III requirements in the "single rule book" undeniably causes banks to hold more capital than they did before the crisis and the regulation of different types of banking risks, in particular systemic risks, is much more nuanced and no longer places all of its faith on the internal risk management and risk assessment of financial institutions. Capital requirements are, however, still low, meaning that the way banks do business has not changed since

the crisis, everyone has just become more aware of the inherent risks. The inherent paradoxes as well as the incentives to enter into extensive risk transformation, maturity transformations and risk diversification are also still present. The regulations try to hamper these effects by creating options for counter cyclical and systemic risk buffers as well as a so-called leverage ratio of 3%. To date we are not certain whether we are any better at predicting a crisis than before, making buffers an invalidated instrument.

The alternative to capital requirements is the introduction of an even simpler and basically the inverse instrument: a leverage ratio. A leverage ratio expresses the proportion of equity to debt or places a cap on the amount of debt a financial institution can hold. Many economists have suggested introducing a leverage ratio of 15–30% and making it the central mechanism of risk regulation (Admati and Hellwig 2013). Both legally and economically/empirically, it is impossible to determine the exact leverage ratio required to make the system less volatile since “more is always better”. It is, however, clear that the currently debated leverage ratio of 3% is nothing but a mere act of symbolism.

Whilst one of the main goals of the banking union is to safely resolve or restructure insolvent banks in future and to sever banking debt or a banking crisis from a sovereign debt crisis, the mechanisms the resolution scheme relies on are far from functional. One of the inherent flaws is leaving it up to banks to write up “testaments” for their future resolution and restructuring. The perverse incentives and room for regulatory capture already trump the belief that such a complex endeavor could be pulled off in future. The EU, however, also currently lacks the means to save or even to restructure banks. The resolution fund will be set up over the next couple of years. Until it is in place, funds from the ESM may be used to recapitalize banks, but even these are not sufficient to recapitalize a medium sized banks at present (Mendelsohn 2014; Hellwig 2014).

Lastly, whether a central bank is the correct institution to regulate large financial institutions is almost secondary to the fact that all of these institutions are still “systemic”, they are all either still too big or too complex to fail and this does not only pose a threat to financial stability to also causes them to act the way they do and take the risks they take.

Aims and Content of the Energy Union

According to Energy Union Strategy (Communication 2015), which calls for “full implementation and strict enforcement of existing energy and related legislation”, a fundamental transformation of Europe’s energy system is required (Energy Union 2015, p. 1). However, the primary goal of this Energy Union is “to give EU consumers—households and businesses—secure, sustainable, competitive and affordable energy”. This falls short of being a statement to end climate change or to end our reliance of fossil fuels and to radically reduces emissions in the near future.

Rather it seems that the Energy Union we have created to date is still merely many declarations of intent.

Agencies within the European Union have increasingly gained powers by means of delegation from the other institutions in order to cope with technical details and specific questions. Notably, the Agency for Cooperation of Energy Regulators (ACER), which previously only assisted and coordinated national regulators but has had very limited decision-making rights, requires new powers and independence “in order to carry out regulatory functions at the European level to enable it to effectively oversee the development of the internal energy market and the related market rules as well as to deal with all cross-border issues necessary to create a seamless internal market” (Energy Union 2015, p. 9). If the existing complexity of the legal framework requires several agencies in order to make it operational, it is more than legitimate to ask whether or not a simplification of its very nature or rather a more structural change is a needed.

As previously described, the Energy Union strategy has five mutually reinforcing and closely interrelated dimensions designed to bring greater energy security, sustainability and competitiveness. These are energy security, solidarity and trust; a fully integrated European energy market; energy efficiency contributing to moderation of demand; de-carbonizing the economy, and research, innovation and competitiveness (Energy Union 2015, p. 4). A timetable for revision of the most important legal texts has been annexed to the Energy Union communication and aims to address all five dimensions.

The measures listed within the timetable are both of legal and political nature. The legislative proposals are listed in detail and the time-frame has been set, giving a coherent roadmap to the Energy Union in practical terms. It is noteworthy that the first and most important priority of the Energy Union is of a legal nature. Whilst the Rule of law should and will always be one of the hallmarks, virtues and principles of European integration, it is questionable whether the statement that “the Commission will use all instruments to ensure that Member States fully implement energy legislation ... and it will strictly enforce the Treaty’s competition rules” will actually lead to the outcome envisaged if the current framework is not substantially modified. Simply adding more percentages to the existing targets or revising existing legislation does not overcome our inability to think on the basis of alternative parameters different from the internal market paradigm. In order to reach other objectives than a functioning internal market, massive derogations are needed. However, these derogations are the ones that may enhance environmental protection, give member states leverage to correct market failures and drive the European integration project in a less market-driven orientation.

It is also currently still questionable whether all these revisions of existing and new legal instruments will coexist in a harmonious way and whether future conflicts between them will be solved without questioning the current status of EU law and the competences conferred to the Union. The potential conflict is further emphasized in the strategy itself which states that: “(r) enewable energy is a no-regrets option but there have been concerns about the costs and impact on the functioning of the internal market” (Energy Union 2015). It is in particular in the cases related

to the promotion of renewable energy sources that the conflict with the internal market has called for creative derogations to the general rule. The Energy Union as such demands increased amounts of public intervention contrary to the internal market logic. Much has been done in the name of a main predominant environmental purpose in order to avoid a competence creep on the energy policy side where member states are still sovereign (Sveen 2014), but this approach needs to be clarified in order to establish legal certainty and clarify the boundaries of EU action within its renewable energies policies.

Alongside consumer issues and responses to climate change, the Energy Union was also established as a response to the European energy security crisis in connection with Russia's annexation of the Crimean peninsula. The Energy Union thus builds on the European Energy Security Strategy which called on policy makers at national and EU level to make clear to citizens the choices involved in reducing the dependency on particular fuels, energy suppliers and routes (Energy Union 2015, p. 4). This was indeed one of the most important backgrounds for the creation of an Energy Union, the catalyst of a larger European project. As the energy security debate confines itself to rectify immediate risks and avoid these in the long-term, the creation of the Energy Union construct demands a broader, more holistic vision of EU energy policy in general.

Options for Regulating Future Catastrophe in Two Tiers

As the descriptions of the banking and energy union have shown, and a comparison with the literature on the Anthropocene highlights, we have managed to create super structures and many new institutions, but without significant substantive change. This is not only reflective of an inability to formulate new rules and laws and but also an inability to think of our future devoid of these risks and working according to different principles. The promised transformation in both the energy and banking sector does not explicitly seek to rectify the core aspects the crisis but stand as a mere change in appearances.

Looking at the Anthropocene, Steffen et al. state that "societies collapse if core values become dysfunctional as the external world changes and they are unable to recognize emerging problems" (2011b, p. 751). Today the European Union, is faced with this threat. "Europe is suddenly not seen as an icon of success but as an emblem of austerity, thus in terms of its promise of prosperity, failure. If success breeds legitimacy, failure, even wrongly allocated, leads to the opposite" (Weiler 2012, p. 831). It seems evermore likely that we will either continue to wrongly assume that this experiment was and will never be more than an internal market or that we will soon be faced with complete disillusion of the entire integration process.

When tackled by legal theorists the Anthropocene trope suggests that ‘humanity’ stands freshly united in a new negative human universality predicated upon common vulnerability in the face of climate crisis.

According to Chakrabarty:

Here the overarching Anthropocene sense of a new, universal humanity bearing responsibilities towards the planet also carries the promise of a more eco-responsive normativity – a normativity reflected in biocultural rights discourse – but it remains critical to counter-balance this ‘new’ Anthropocene ‘human commonality’ with the fact that human universals remain stubbornly marked by histories, presents and future histories of profound hierarchical inequality.

Skeptics of financial capitalism and climate change realists have long suggested that only a complete revision of our systems and their mechanisms can prevent catastrophe. In this context material changes to radically reform the financial sector or to end man made climate change require the establishment of new legal doctrines and principles. This is our “first best solution”.

As a second-best solutions we propose is development of the legal principles of environmental protection and financial stability. Alongside other principle, careful acts of balancing would mean that these goals are constantly taken into consideration on an EU level. Certainly in the field of environmental protection these necessary treaty or EU constitutional law changes are already well on their way.

Complete Reinvention of the System and its Principles

The calls for new principles are a new economic and legal system: a “fair economy” (Finketscher et al. 2013) or the introductions of “regenerative capitalism” are by no means mainstream or present in everyday political life, but are becoming ever-more frequent. Alongside people like Naomi Klein capturing the climate debate and Thomas Piketty bringing equality back on the agenda, the capital institute has recently put for a white paper that proposes a “Regenerative (economic) hypothesis”:

The purpose of a Regenerative Economy is to promote and sustain human prosperity and well-being in an economy of permanence. A new generation of legal principles can come to be applied to give deeper meaning to both sustainability and environmental rights across all nations. The fact that environmental rights are being acknowledged and embraced independently, in different places, is evidence that they share common roots in human instincts and cultural values about human relations with nature.

If we believe that Anthropocene scenarios are real and already present and we also believe that the instability and destructiveness of the financial sector poses an imminent threat to the overall wealth and equality of our societies, we need to

change the fundamental assumptions on which our economic systems are based and the goals they are meant to serve. Translated into law and legal theory, this is nothing more than the introduction of new principles and the transposition of rules to make sure that these principles are optimized.

This notion of the principles of law is borrowed from Ronald Dworkin's and the German legal theorist Robert Alexy's respective theories of legal principles. Dworkin distinguishes principles from rules, as the two most important types of legal norms. Principles are legal considerations that lack the all-or-nothing applicability of legal rules (Dworkin 1977, p. 24). Rules are considered rigid norms that are formulated in manner, which does not allow balancing or optimization, but means, that are either to be applied—or not applied. According to Alexy, if a rule cannot be applied and there it is not possible to formulate legal exemption, then it is invalid and needs to be eliminated from the legal system. Since principles are no-rigid statements of intent, resolving the conflict between two principles is more complex than rules. Principle statements such as 'no man may profit from his own wrong' cannot always be enforced, but are always valid. According to Robert Alexy principles are statements of law that need to be fulfilled to the highest degree possible at any given point in time. When two or more principles come into conflict, they do not cancel each other out, but require balancing and the optimization of each principle: "wherever legal principles exist, the duty to optimise their normative impact follows" (Alexy 2003, p. 135).

According to Alexy and many of his critics (Poscher 2012), this first requires the balancing of the conflicting principles: "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other." (Alexy 2002, p. 47). In most cases, the second step follows from the fact that the result of this balancing will be the partial or complete prioritization/precedence of one principle over another, but only for a specific case or in a specific circumstance. Here, Alexy proposes defining the exact conditions and requirements that need to be fulfilled, in order to give one principle priority. Hereby "the circumstances under which one principle take once principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence" (Alexy 2002, p. 47).

Climate change needs to be stopped, the Anthropocene dealt with and "finance needs to go back to being an instrument directed towards improved wealth creation and development" (Lastra and Wood 2009, p. 531–550). In each of these cases, principles such as **sustainability, longevity, cooperation, distribution and equality** come to mind. All of these principles are described and envisioned by Robinson (2014). These principles need to be poised directly against and override the principle of wealth maximization and the acceptance that profit can be achieved without any consideration for others or the environment. These 'new principles' would therefore be given precedence/priority and a new legal and economic system would need be created by means of rules that optimize the fulfilment of these principles. In the Anthropocene context and based on the same theories, Paloniitty (2015) suggests the need to formalize the weighing of competing legislative values and objectives—arguing that the formalization of such balancing should become

the judicial norm. Her hope is that this kind of interpretive, adjudicative methodology will allow judicial decision-making better to respond to the complexity of the issues involved in the deterioration of ecosystems and bring about a “paradigmatic shift”.

The degree of threat or the sheer necessity to change to rethink or change the system, as was to some degree the case with the Deal New or the rise of the social market economy after of the banking crisis of 1929, does not in itself overcome the massive political and legal hurdles that challenge to systemic change in Europe as well as in the member states. Whilst the member states constantly guard their sovereignty and own interests, the European Union is deeply settled in the idea that it is primarily a trade union and a “common market”. The lack of a European government and the inability to set its own agendas and policies, make it impossible for the European Union to re-envision its own future in times of crisis.

Though many have suggested that the ‘ever closer union’ is moving towards being more than a common market, this “more” is not yet tangible.

For some Maastricht was finally the ushering forth of ‘real’ European integration. No longer merely a marketplace, but veritable economic and monetary union, the upgrading of the European Parliament, human rights and the environment in the Treaty expresses verbs with the expectation of more to come (...). For others, Maastricht was a shill game, smoke and mirrors: a half-baked monetary union, an ever-yawning democracy deficit with the power to shift the EU not match by veritable accountability and citizens impact, a vacuous concept of citizenship, with no duties and empty rights and an abandonment of the original and humane concept of Community for the hackneyed Union ... (Weiler 2012, p. 826.)

Principles such as distribution and sustainability bear no relation to a mere trade union or the further integration of a common market. They would require that the aims and the identity of the European Union are reinvented and probably necessitate a change that is more radical and more transformative than the failed attempts at constitutionalism or the mere integration of the European Charta of Human Rights—an elevation of rights and norms that all member states had already agreed upon.

In reference to the legitimacy crisis Weiler states that: “This is an interesting time to be reflecting on the European construct. Europe is at a nadir which one cannot remember for many decades and which, various brave and pompous or self-serving statements notwithstanding, the Treaty of Lisbon has not been able to redress. The surface manifestations of crisis are with us every day on the front pages: the Euro crisis being the most current. Beneath this surface, at the structural level, lurk more profound and long-term signs of enduring challenge and dysfunction and malaise”. Beyond reflecting on the structure and content of the European Union, it is also an (interesting) time to reflect on the eradicating and dehumanizing effects of financial capitalism and a time to realize that the threats of climate change are very real. According to Steffen et al.:

We are the first generation with widespread knowledge of how our activities influence the Earth System, and thus the first generation with the power and the responsibility to change our relationship with the planet. Responsible stewardship entails emulating nature in terms

of resource use and waste transformation and recycling, and the transformation of agricultural, energy and transport systems (2011b, p. 757).

It is therefore time to reinvent both the structure and the principles of the European Union and to go in search of its possible future identity. In the past, such changes and the abandonment of old ideas and structures have been brought about remarkable and crass political “events” (Badiou 2012), such as the French Revolution regarding our notion of freedom and World War II regarding the spirit still transported by the *Schuman Declaration*. For many reasons, it is unlikely that the daunting financial or climate catastrophe will be such a transformative “event” in the very near future. Certainly not on a European level: “Globalized capitalism exploits people locally. Despite the hopes of left internationalization and liberal cosmopolitanism, effective politics still takes place at home” (Douzinas 2013). Both the undemocratic structures in Europe as well as the complexity of the issues at hand make it difficult convey a sense of broader public agency and make the currently existing structures evermore implicated in capture and the interest of firms who profit from the status quo.

Inclusion of New Goals and Introduction of a Careful Act of Balancing

The second-best solutions propose the integration of new principles into the current system or rather activating the legal principles within the treaty itself. These would not override currently dominant aims such as the development of a competitive common market, but would be weighted and balanced against them carefully. Legally this can be done by means of the expansion of the goals of the European Union and by the introduction of so-called integration clauses where important principles are described.

The goals of the EU have already been expanded to include environmental protection. Art. 3(3) TEU now states that “the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance”. Within this lies the complexity of balancing all existing aims of European integration. However, Art. 11 TEU (the environmental integration clause) now demands that:

environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”. Such integration clauses “participate in a common project, namely ensuring that the actions of the Union are guided by a quality-of-life project ... these values are, indeed, a counterweight to the project of an essentially economic nature” (De Sadeleer 2014, p. 25).

The legal status of the environmental integration clause is debatable and faces several challenges (De Sadeleer 2014, p. 21). Some argue that they are mere statements of intent and “void of any legal significance” (De Sadeleer 2014, p. 25–26). However, making more explicit use of the environmental integration clause or rather “taking it seriously” (Sjåfjell and Wiesbrock 2015) may trigger a gentle however precise change of the current market-based system without changing its core. This exercise combined with a horizontal reading of the treaties (meaning that all aims and goals are considered equal) places principles and values other than the common market in the forefront of European integration. This holistic approach that requires decision-makers to take into account not only the full range of interests affected by their decisions could rescue the current market-based logic which is not able to respond adequately to the risks faced.

As explained by Johnston and Van der Marel (2013 p. 189):

[t]he preservation and improvement of the environment is, together with the functioning of the internal market, one of the two aims of Article 194 TFEU. This means that a derogating measure which does not achieve a higher level of environmental protection is contrary to both of the objectives of Article 194 TFEU, since by definition a derogating measure will also be an obstacle to the functioning of the internal market

The *sui generis* nature of EU law, which is sometimes perceived as a weakness could then turn out to be its very strength. Notably, the focus on a teleological interpretation of the treaties causes a “focus on the overreaching objectives and a dynamic interpretation of legal requirements to flow from them” (Sjåfjell and Wiesbrock 2015, p. 71). Hence the “codification of the principle of sustainable development entails all-encompassing legal duty to integrate environmental protection requirements in the policies and activities of the Union” (Sjåfjell and Wiesbrock 2015, p. 52).

More is left to be seen but the principles outlined in the integration clause needs to be more explicitly operationalized by the Court of Justice. If climate change and environmental protection are to be made more operational within the legal framework, there is a need to explicitly describe how the environmental integration clause is ordered with regards to other priorities. A clarification on the way in which it operates with regards to other primary laws—the market freedoms and competition rules—is also necessary in order to avoid confusion and enhance legal certainty. The Treaties contain tools and they all need to be activated by a thorough evaluation and interpretation by the European Court of Justice.

With regards to the banking sector, further goals such as financial stability, social welfare, sustainable development and the equal distribution of wealth and opportunities, could also be included without changing the competences or current constitutional structure of the EU. Elevating both financial stability as well as environmental protection to this level, may lead to the sought-after transformation sought for. It is not merely a change in appearances but a credible alternative in order to make the changes necessary without rewriting the European constitutional framework.

It is also perhaps time to reconsider, that European political integration may bear fruits beyond the physical transportation of the energy itself. Locking together European countries by way of infrastructure and the smart-grid discourse is not enough. The “finalisation of the internal energy market-paradigm”—one of the main aims of the energy union—requires Member states to work together politically and not only economically. The Banking and Energy Union should go hand in hand with a revision of the aims of the European Union as such, firmly allowing the right remedies to be sought and thereby avoiding the application of the market-based approach where the internal market in all its forms and shapes may solve the existential crisis the Union is facing. Europe cannot be made according to a single plan as was set out by the Schumann Declaration itself. Even if the Treaty of Lisbon and the political integration prior to it made the Union “more than an internal market”, much is still left to be done in order to create the structures and legal remedies necessary in order to face the challenges of our time. *Mens sana in corpore sano* should be a guiding principle also in this case. According to Weiler, the Milwardian rescue of the nation state is now reversed. Rather, “the pendulum has swung and in the present crisis it will be the nation state rescue of the European Union” (Weiler 2012, p. 827). This can only be done by allowing the integration clauses to work by conferring the competence necessary to the EU level. This is a matter left up to the Member States and is indeed not merely a question of technicality. It is rather a question of what sort of political integration Europe should be and what kind of values the European Union should protect.

Conclusion

In the aftermath of the financial crisis and in the face of climate catastrophe, the European Union created both a Banking and an Energy Union. These super institutions can be seen as significant moves towards greater coordination and serve the realization of goals such as stability and sustainability. These are important and noble goals, but the essential question is whether the substantive changes they offer are sufficient. Questions of sufficiency and degree, which are as difficult to capture with the language and methodology of the law, as notions of risks and catastrophe, are posed by comparing crisis narratives and literature on the Anthropocene with the content and aims of the respective unions. Literature on the Anthropocene describe a fundamental change and paradigm-shift, that suggest the necessity to abandon status quo assumptions about social life and envision a life based on principles such as sustainability, longevity, cooperation, distribution and equality. What needs to be abandoned is the complete reliance on the mechanisms of the market as the primary force regulating societal system. Albeit politically unlikely, we suggest that this can be done by a complete reinvention of the system and the principles on which it is based. Our second-best solution requires the extension of the principles and aims of the European Union. This too would require reinventing the function and the identity of the European Union itself and truly envisioning a

Europe that is more than merely a market. In this spirit, and particular regarding the continuation of trying to solve remarkable crisis solely with mind-numbing market-related tools such as bad banks, new types instruments and expansive emissions trading systems: There are not only true or false solutions, there are also false questions (Zizek 2006).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM (2015) 80 final Brussels 25.2.2015; Communication from the Commission to the European Parliament and the Council: European Energy Security Strategy COM (2014) 330 final, Brusse 28.5.2014.

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